Appeal No. UKEAT/0400/13/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 7 February 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MR J B HEALEY — APPELLANT

WINCANTON PLC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Bar Pro Bono Unit
For the Respondent	MR NICHOLAS SIDDALL (of Counsel) Instructed by: Hill Dickinson LLP 1 St Paul's Square Liverpool L3 9SJ

SUMMARY

UNFAIR DISMISSAL – Reasonableness of dismissal

A number of grounds were raised to challenge an Employment Tribunal's decision that the dismissal of the Claimant for failing deliberately to obey a reasonable management instruction. All failed on the facts.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. In a claim for unfair dismissal, a Tribunal is obliged to answer the question posed by section 98 of the **Employment Rights Act 1996**. That requires the Tribunal to ask whether the reason for dismissal or, if more than one, the principal reason has been established by the employer and is one of the qualifying reasons. A focus upon those provisions means that what is under scrutiny is not the employee's conduct but the employer's and, most specifically, that of the person or body which takes the decision to dismiss. It is likely that only that person, or the members of that body, can actually say what was in their mind. There may be circumstances from which a reason other than that which they advanced might be inferred, but the process is one of inference and is not, for obvious reasons, amenable to direct evidence.

2. The Employment Tribunal at Liverpool, Employment Judge Reed, the members including a Miss Price, decided for Reasons delivered on 12 September 2012 that the Claimant failed in his claim that he had been unfairly dismissed. This is his appeal against that decision.

The facts

3. The Claimant was an HGV driver. The employer said that he had been dismissed on 30 December 2010 after a disciplinary hearing for wilfully and repeatedly refusing to carry out a lawful instruction. The Employee contended that that was not the real reason. He said it was because he had brought Employment Tribunal proceedings some 11 months earlier and subsequently had raised a grievance to the effect that the system of operating tail lifts on the lorries was an unsafe system and ought to be abandoned. In its conclusion of fact, the Tribunal necessarily looked to see why it was that Mr Cowley, the dismissing officer, took the decision he did. Viewed broadly, the judgment, which ended up with an acceptance of the credibility of his evidence, that it was the employer's reason, was reached after considering other matters

which might give rise to the contrary inference. The Tribunal set out with some detail, in what is a succinct and focussed judgment, that Mr Cowley had known of the Tribunal proceedings, and he had also known of a grievance made in early December 2010, shortly before the decision, in relation to the safety of the tail lift. The Tribunal appreciated that, if the grievance were upheld, it would cost the employer a substantial sum of money, which, even for a large business such as the Respondent's, was not trivial. If the grievance were to succeed, it might also have the result that it would prejudice a significant contract with a major customer.

4. It took into account, against that, whether the decision was reached on clear evidence or whether, as it put it, the evidence was weak. The evidence was, effectively, incontrovertible and not controverted. That was that, on an evening in June 2010, the Claimant had been asked by his manager, a Mr Maguire, to undertake "temp checking" to check the temperature of trailers used to transport food in cool conditions. He indicated he would not do so. He was asked to put his boots on (that is a reference to safety boots, which it is necessary to wear around the yard, for obvious reasons) and to come to Mr Maguire's office to explain the reason for his refusal. It was said that he did none of those things, though subsequently he did speak on the same evening to Mr Maguire but steadfastly refused to give a reason. He said to the Tribunal that this was not refusal; rather he was objecting to doing that which was required of him. A transcript which he produced, to which the Tribunal make reference and which is before me, demonstrates that, when Mr Maguire challenged him with his allegation that the Claimant had refused, the Claimant sidestepped the question by suggesting that Mr Maguire had no right to investigate that matter since he was, in effect, a witness to it. Therefore it might be viewed, objectively, as a refusal to answer those questions.

5. In summary, the evidence before the employer, and before the Tribunal as to that which was before the employer, was that an instruction had been given to the Claimant and disobeyed.

It is pointed out by Mr Siddall, who appears for the employer, that it was conceded at the disciplinary hearing that the instruction was reasonable, and that has not been controverted before me, and he did not in fact do what had been required. Nor did he advance any explanation, as required, why he had not done so. The Tribunal therefore thought that this could be seen as a wilful and repeated refusal to carry out instructions given by the manager.

The Tribunal decision

6. The Tribunal, having accepted the credibility of Mr Cowley and therefore his evidence as to what was the reason for dismissal, and therefore implicitly rejecting the argument that it was for the reasons which Mr Healey asked it to infer, had in effect dealt with the central issue in the case. Since it was not disputed that an instruction had been given and had not been complied with, no question here arose of any need to enquire as to the reasonableness of the grounds for the belief in misconduct, nor any question of the reasonableness of an investigation. The Tribunal, in any event, said there was ample evidence (paragraph 25). At paragraph 26 the Tribunal said this:

> **"The next question for us was as to the reasonableness of his decision relating to sanction. We were conscious that the disciplinary proceedings taken against Mr Healey earlier in the year had been by reason of a failure on his part to comply with a request from a manager but on that occasion he had only received a warning. However, we believe it is well known by most employees that if they indicate a settled intention to disobey a reasonable instruction from a manager, that is a matter that is going to be regarded most seriously by their employer. Nowhere in the disciplinary process did Mr Healey take issue with that contention or suggest that if he had indeed behaved in the way alleged by Mr Maguire that that might not amount to any sort of serious misconduct. Mr Cowley was reasonably entitled to regard this as gross misconduct."**

7. The appeal against that decision reached for those reasons relies upon seven grounds. I shall pick these up from the way in which Mr Kohanzad addressed them in his submissions to me. He argued, first, that the Tribunal had not approached the question of the reason for dismissal in the manner which was advocated by Mummery LJ and the court in **Kuzel v Roche Products Ltd** [2008] IRLR 530. That was a claim in which the Tribunal was

not satisfied that the employer had made out a potentially fair reason under section 98. The claimant was asserting that the dismissal was by reason of making a protected disclosure. The Tribunal, however, was not satisfied that that was the reason either. Accordingly the claim failed. The curiosity of the case is that the reason for dismissal was never established to the satisfaction of the Tribunal, whether it was as the employer had to show or whether as the claimant wished it to be held. In the course of his judgment, Mummery LJ said this, upon which Mr Kohanzad relies:

> **"57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
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> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
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> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."**

8. Basing himself on that, Mr Kohanzad argued that the Tribunal here erred in failing to address the question whether the Claimant had provided some evidence that he was dismissed for having made a protected disclosure. He argued that there was a clear conflict between the cases of the Claimant and the employer, and the Tribunal had failed to explain how it was that it had resolved the conflict between those two cases. He argued that the failure to explain how the matter was resolved was "particularly important in the light of the evidence which supported the Claimant's case in this regard". He then drew attention to four matters: firstly, the failure of the Respondent to follow its own disciplinary process. (This was an argument to the effect that, usually, disciplinary hearings have to follow within seven days of the incident

giving rise to them. Here the incident was at the end of June 2010. The disciplinary hearing was at the end of December.) Secondly, that Mr Cowley argued that he did not know of the grievance or the protected disclosure because he was unaware of it but in evidence had said that he was aware of the grievance and the disclosure at the time of making his decision. Therefore, having turned turtle on such an important matter, this dent in his credibility required express consideration. Thirdly, that the Respondent had a clear motive to dismiss the Claimant. And fourthly, that there was an inconsistency in treatment between the Claimant and other employees, whose statements were simply taken as read. They said, in those statements, that they too had declined an invitation to temp check but nothing had happened to them.

9. This is a "reasons" challenge. It is closely allied to Ground 3, which raises the same question of inconsistency of treatment. The general principles which apply to a reasons challenge are that a Tribunal must, in accordance with both its obligation under what was rule 30(6) and in general principle, tell a losing party why they have lost, both in justice to that party and so that a court on review may know the reasons so that, if there is any error of law, it may be identified and corrected. This recognises the public aspect in the administration of justice, for the public in whose name justice is delivered have a right to see what is done on its behalf and, it may be added, giving reasons also affords a useful aide-memoire to judges when articulating their conclusions.

10. The recognition of these principles, however, does not and has not been thought to require that every single point which is raised must be accounted for in its Reasons by a Tribunal. Thus, as Peter Gibson LJ in **High Table v Horst** [1997] IRLR 513 said of a Tribunal at paragraph 24:

> **"...whilst it must consider all that is relevant it need only deal with the points which were seen to be in controversy relating to those issues, and then only with the principal important controversial points..."**

11. As was said in a slightly different context, but of general application, by the then Master of the Rolls, Lord Phillips in **English v Emery Reimbold & Strick** [2003] IRLR 710, paragraph 19:

> **"...not... every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained."**

12. He added, at paragraph 118:

> **"...an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."**

13. Here, there could be no doubt in general terms why Mr Healey had lost. That was because the Tribunal accepted the evidence given to it by Mr Cowley. Further, it said broadly why it accepted that evidence. It had considered his demeanour, his credibility, weighed against them the matters from which inferences might be drawn as to a contrary motive, and looked to see whether there was a compelling reason for his reaching the decision he said he did upon the basis upon which he said he reached it. It was in that context that it found the evidence to be as strong as I have indicated.

14. The question, therefore, is whether any of the particular facts to which Mr Kohanzad draws attention is a factor which was in controversy at the trial and required further explanation beyond that which was given. As to the failure to follow disciplinary process, that was considered by the Tribunal. They criticised the employer for its lateness but thought this was not creative of any disadvantage to the Claimant. It did not deal directly with Mr Cowley's

change of mind but it did recognise, in dealing with the question of dismissal, that he did not seek to rely at all upon the existence of the warning given earlier in the year. Although the Tribunal does not say so, it is common ground that the chronology, so far as the grievance is concerned, was helpful in explaining why the Tribunal took the view that there was not much merit in Mr Healey's contention that the company had decided to put the disciplinary process on one side and resurrected it only after he presented his grievance. That is because, after the incident in June, he was off work sick until late October. Having returned to work then, there was an investigation in early November into the allegations. That is recorded in Mr Healey's own witness statement. The grievance was raised on 7 December. The process leading to the disciplinary hearing, involving a first investigatory stage, had therefore been under way before the grievance could have been a factor in that decision. The Tribunal did not set that out, but I do not think it needed to because it needed only to deal with the broad issues posed it by section 98 and to say sufficient as to its reasons for resolving those issues as it did.

15. As to the suggestion, in argument, that **Kuzel** supports the approach that it is necessary for a Tribunal to explain why it accepts one and rejects the other argument, thereby setting out each, examining the merits and de-merits of each and giving a reason on balance, this may be appropriate if what is in issue is whether a particular act or event happened. Here, however, as I pointed out earlier, the inquiry was different. It was into what was in the mind of the dismissing officer, what were his reasons. Only he could give evidence directly of that. The issue was therefore whether he was believed or not. It is sometimes quite difficult for a Tribunal to give better reasons for accepting a witness's evidence than that they believed it. In many circumstances, that is likely to be sufficient, and there could be no better articulation of it merely by using more words. Usually one would hope that the Tribunal may be able to say something more, but, as observed in the cases to which I was directed - see, for instance, the observations made in **ASLEF v Brady** [2006] IRLR 576 at paragraph 72 - it is entirely a matter

for a Tribunal how it reaches its conclusions (that decision rejected a slightly different argument, namely that there should be a formulaic approach to decision making, within which a Tribunal should rigidly fall, but is indicative nonetheless of the wide variety between cases which must inevitably depend upon their particular facts, and as to which no one route may be prescribed, save that the result must be sufficient to satisfy the **Meek** test).

16. I reject the argument that both possible reasons should have been examined, balanced and a conclusion reached on probability as to the result. What mattered, as I repeat, was whether the Tribunal accepted what Mr Cowley said. Nor do I consider, in context, that the failure to draw a contrast between Mr Cowley's evidence at the Tribunal and his witness statement as to his knowledge was a matter to which the Tribunal should necessarily have paid regard. The fact that he acknowledged that he had such knowledge was, on analysis, more likely to tell against the employer than it was to go in favour of the employer and only he, probably, would be able to say whether indeed he had that knowledge.

17. What has given me greater cause for concern has been the question whether the comparative evidence should have been referred to by the Tribunal. It is said by the Claimant that it was not. Mr Healey had presented witness statements from five witnesses other than him. Two of those mentioned the question of possible disparate treatment. Mr Colin Rooney said that he had been ill, returned to work on light duties and on his first shift back given a job of temp checking. He had responded to the manager who had asked him to undertake that task to say he was not trained and was told to take it up with the shift manager, who had asked why he had not done the job, and he explained what he had been told by human resources: that is to do light duties. He was told that that matter would be checked out.

18. A second witness, Mohammed Amin, said in his witness statement:

> **"I have been asked to do temp checking a couple of times by Bill Maguire and Debbie Barker [Bill Maguire being the same manager who had instructed Mr Healey to act]. I refused both times and nothing was said or done about it. I know that other twilight drivers have been asked to do it and have refused. Nothing ever happened to them either."**

He went on to explain why he personally did not find temp checking amenable and why he did not wish to do it.

19. The Claimant himself presented a covert DVD of his interview with Mr Maguire. In the course of that, at page 121 in my bundle, Mr Maguire said that if he had come to him and said he did not feel comfortable about doing the temp checking, that would have been it. His next instruction would have been to go on the shunt, another duty in the yard, involving manipulating an HGV tractor around the yard. This was because other twilight drivers had gone on temp checking and said they were not comfortable with it. To which the Claimant responded, "I know. And others have said they're not doing it all and er...nothing's said to them". The response was not to controvert that directly but to say, "You know there's all sorts reasons, I don't really want to get into the reasons...", which may have been dealing with another issue entirely. Thus there was material which was capable of showing a difference of treatment as between the Claimant, on the one hand, and Mr Rooney, Mr Amin and unspecified others on the other hand.

20. In the closing submissions, which extend to some length, prepared by Mr Healey for the Tribunal, one paragraph alone relates to this particular point, paragraph 23. It reads:

> **"For the claimant the Tribunal heard the claimant himself and three former driver colleagues, Mr Stone, Mr Amin and Mr Rooney. The claimant would ask the Tribunal to accept the evidence of his witnesses that drivers at Lea Green routinely refuse to do temperature checking work and nothing is normally done about this. The claimant submits this is evidence of unfair treatment of himself."**

21. It is, on the face of it, surprising that if there was a true disparity of treatment between the Claimant and so many others at Lea Green, more was not made of this particular point.

22. The response of Mr Siddall for the employer is two-fold. First, he submits that the reason why the Tribunal did not decide that there was any true disparity of treatment was known to the Claimant because the point had arisen during the course of the hearing and the Judge had clearly indicated at that time why he had taken the view he did that the comparators were not true comparators, and the matter was thereafter not pressed, save to the extent of the one paragraph to which I have referred.

23. The second was a more subtle argument. It is that the Tribunal actually considered the point, though it did not specify the evidence. It considered the point in the second sentence of paragraph 26, which I have already cited. The reference in that sentence to disciplinary proceedings leading only to a warning was evidence that the employer, in dealing with a refusal to accept a management instruction by an employee, thought it appropriate, in Mr Healey's case itself, that it merited only a warning and, by extrapolation, not therefore a dismissal. This, in essence, encapsulated the point to which the evidence of comparators was directed. The Tribunal had gone on, however, to contrast that with what it described as "a settled intention to disobey a reasonable instruction from a manager". That, it concluded, would be regarded most seriously by the employer, and it is common experience in this Tribunal that it is always liable to lead to a dismissal such that one can rarely be held, if ever, to be outside the range of reasonable responses.

24. The case for the employer is that there was good reason for the Employment Judge to take that approach. The evidence, not challenged, as advanced by Mr Rooney and Mr Amin, whose statements were read, fell short of showing that they were in the same material

circumstances as had been Mr Healey. The Tribunal's own description, in paragraph 26, encapsulates this. But, argued Mr Siddall, there was no clear evidence that they were trained. Indeed they said they were not, though he asserted that the Claimant was, and had indicated so. Secondly, they had not been told to put their boots on. Thirdly they had not refused to give an explanation as to their refusal. Indeed it is implicit in that which Mr Rooney says that he had given a reason which was likely to be acceptable. The evidence to which they referred, relating to the treatment of others, was so hopelessly unspecific as to give rise to no obvious inconsistency of treatment.

25. Though I have some concern that the point was not recognised in the judgment of the Tribunal and would not regard it as sufficient if a point is central, important and really material that a Judge should deal with it in the course of the hearing without recording the fact in the judgment, I have in the event been satisfied that there is here a sufficient compliance with **Meek** and rule 36. The matter, as it seems to me, was not a significant issue by the close of the case. It was not a significant issue on its own during the case. It related to other matters in the case such as the reasonableness of the dismissal, as to which there could be little argument that the decision to dismiss fell within the range of reasonable responses, and potentially as giving rise to the question whether Mr Cowley had decided as he did by singling out Mr Healey for adverse treatment, a matter plainly in the mix which was considered by the Tribunal, albeit succinctly, giving in my view adequate reasons.

26. The second ground of appeal was that the Claimant was dismissed because he made a protected disclosure raising health and safety concerns - that was his case - and that the accuracy of the content of the grievance was important such that the Employment Tribunal should have looked at it. The reason for this was that it was said that a meritorious complaint would have been a strong ground for dismissal and the Tribunal failed to address its merits.

27. I do not accept this ground. The Tribunal was well aware and took into account the serious consequences the employer might suffer if the grievance was upheld. It was accepted by the employer, as recognised in the first paragraph of the closing submissions of the Claimant, that the grievance was reasonable and genuine. In that light, there was no need, as it seems to me, for there to be any further exploration. It would say nothing about the true reason for dismissal which those concessions did not already make.

28. As to ground 4, the point is a similar one. The Claimant complained that he had received a written warning because he had brought earlier Tribunal proceedings. He complains that the Tribunal appeared to think that, because the Respondent averred that it did not rely on the warning, it, the Tribunal, did not need to look into the matter.

29. The first point is that, so far as the reason for dismissal was concerned, the Tribunal accepted the evidence of Mr Cowley that he did not have in mind the written warning. As to the other way in which the matter might have been relevant, which does not appear to have been argued directly to the Tribunal, but logically was available, it might be said that, if the warning had been given in bad faith on a pretext without good reason, it might give a clue as to the way in which this employer dealt with this employee, which would itself cast light upon the honesty of Mr Cowley in expressing his purported reasons for dismissal in December.

30. The Judge responded to that suggestion in further comments following upon an affidavit asserting bias and procedural irregularity. He did not say that the matter was irrelevant. He did say that it was not of sufficient material relevance for him to permit examination. There is an important point of principle here. Evidence may not be admitted unless it is relevant. But the fact that it is relevant does not necessarily mean that it is admissible. It is now well-established

that, if a point is insufficiently material or if it would be disproportionate in the circumstances to explore the point, a Tribunal is fully entitled, in the exercise of proper control over its proceedings, to disallow evidence or questioning upon it. The Judge plainly took that view. He said, in his further comments, that:

> **"..that would have required...an examination akin to the consideration of an unfair dismissal claim in relation to the warning [about which so far as I am aware, no other complaint had separately been raised], looking in detail at the material that was before Mr Cowley, and taking his and the claimant's evidence as to the weight that might reasonably have been accorded to it and then determining whether the evidence was such that [the tribunal] ought to infer an improper motive on behalf of Mr Cowley..."**

31. He commented, in terms which are entirely within the Tribunal's entitlement:

> **"There will perhaps be exceptional cases in which it is appropriate to undertake such an examination of matters that are wholly extrinsic to the issues directly before the tribunal. I do not think I can be justifiably criticised for thinking this was not such a case."**

32. I do not criticise him for taking that view. In a proper case, it is open to a Judge to admit relevant evidence, but the focus here was and remains centrally upon the reason for dismissal in December. The evidence as to a final warning given some ten months earlier was not likely to illuminate that matter to any great extent. In applying the overriding objective, a Tribunal must act proportionately and I cannot say that the discretion of the Employment Judge here (see, as to there being a discretion, **Krell v Ransom**) was improperly exercised.

33. The fifth ground was, again, a ground which went to the adequacy of the Tribunal's Reasons. It is said that he vigorously argued that he had been set up. As I understand his case, it was that he could have shunted rather than temp checked. The employer had asserted at one stage in the proceedings that someone who also could have temp checked was able to shunt, and he indicated that that person actually was physically incapable of shunting because of a neck condition at the time. The Claimant argued from this that he had been set up.

34. I am prepared to accept that the Claimant may well have laid some stress upon this. One of the difficulties which Tribunals frequently encounter is in maintaining a focus upon the wood when being distracted by the trees. Where there is a side issue which is unlikely to be, and logically will not be, of any assistance, a Tribunal does not have to mention it. It may be wise to do so but it does not, as a matter of law, commit an error by not doing so. Here, to be set up, the Claimant would in some way not have been given an order which was reasonable for him to receive, as he accepted at the disciplinary hearing. He would have been in a position, had he wished, to put on his boots and to explain why it was that he did not follow the order, but rather objected to it, in his words. None of that has any flavour of set-up about it. Set-up looks more like smokescreen. But that is not a decision for me. My only question is whether it was requisite for the Tribunal to mention something which, on analysis, was going to take matters no further given that there was no real dispute as to what had actually happened in June 2010. It was not.

35. Grounds 6 and 7 raise different matters, both originally pleaded as matters of bias. Ground 6 was that Miss Price was a member of the Tribunal. She had been a lay member in an earlier case in which the Claimant had been a litigant. The Judge in that case had been Employment Judge Robinson. The Claimant complained about apparent bias demonstrated by the way in which Judge Robinson had behaved. The matter came to appeal before this Tribunal, presided over by HHJ McMullen QC, which gave judgment: UKEAT/0303/12/LA on 12 December 2012. The central ground upon which the Appeal Tribunal decided that the appeal should be allowed, and a re-hearing occur, was that the Claimant had previously been a client of the Judge. That had been some 13 years before, but the Appeal Tribunal held the passage of time was not sufficient for the unfairness in his hearing an appeal against a former client to disappear. The Judge was not aware, during the course of the case, of that connection,

but later became aware of it. There were individual matters in the way in which the Judge had behaved toward Mr Healey, to which Mr Healey took objection. One of those was that he had sought to ask questions about a relevant topic but the Judge restricted him to one question only. The EAT thought that unfair. In its disposal, Judge McMullen QC indicated that the three specific points raised by Mr Healey as to the way in which the proceedings had been conducted would not, if taken on their own, have been sufficient for him to regard the case as vitiated by the appearance of bias. When, however, allied to the failure of Judge Robinson to recuse himself from hearing an appeal involving a former client, they were.

36. In preparation for the hearing of the appeal in 0303/12/LA, the comments of the lay members of that Tribunal had been sought in accordance with the EAT Practice Direction. Miss Price commented. She said that she saw absolutely no evidence of bias on the part of Mr Robinson and that he was:

> **"...balanced and even-handed in the conduct of the hearings while seeking to focus on matters relevant to the main issues the Tribunal was concerned with. As both a witness and representative Mr Healey needed direction or assistance in doing this, but again I saw no evidence of any bias against him during the hearing."**

37. It is said that, by describing conduct which was later to be criticised by the EAT as unfair, as being balanced and even-handed, she was showing a lack of objectivity and a prejudice against Mr Healey.

38. Applying the test in **Porter v Magill** [2002] 2 AC 357, which is well-known, I do not accept that these circumstances give rise to any reasonable apprehension that Miss Price would have been biased against Mr Healey. It is important to remember what bias is. It is a personal interest in the case (plainly not in play here) or an irrational predisposition in favour of one party and against another. The fact that Miss Price said what she did as to her view of the way

in which Judge Robinson had conducted himself does not, on the face of it, suggest any hostility or irrational preconception of the facts one way or the other, so far as they concern Mr Healey. Mr Healey confirmed through Mr Kohanzad that he had seen no trace of animus toward him in the course of the hearings, so far as she was concerned. Faced with this difficulty, Mr Kohanzad argued that what she had done was demonstrate a lack of objectivity such that she should not have sat upon the case. She had not seen, objectively, that which was evident to the Appeal Tribunal in due course.

39. The difficulty with this argument is that, if one relies simply upon a lack of objectivity, expressed in terms such as these, any lay member who sees nothing wrong in the conduct of a judge, when asked, in respect of whose case it is thought that there is a risk or possibility of bias by an Appeal Tribunal, should therefore be disqualified and indeed is disqualified from further sitting. Thus must be disqualified from sitting on any case, because it is an incapability of being objective which is relied upon, which is not specific to the particular litigant in the case in which it is first manifested. In Miss Price's case, there is no reason to think that the views she expressed were in any way specific to Mr Healey having been the Claimant. This would be a startling consequence. It leads one to suppose that the premise is wrong.

40. In short, though there may be circumstances in which a lay member or judge demonstrates that they have so lost their objectivity as no longer to be an appropriate judicial member of any Tribunal, the grounds here for saying that Miss Price did are insufficient.

41. Finally, I turn to the allegations that the Judge unfairly interrupted the questions which the Claimant wished to ask, stopped him from asking some questions, and insisted that he explain the purpose behind some other questions before asking them. The particulars were set out in an affidavit by Mr Healey. There is little difference between his account and that given

by the Judge and by Ms Morley, solicitor for the Respondent. Thus the principal complaint is that the Judge indicated that the Tribunal need not hear any evidence exploring the written warning. I have already indicated that, since it was not said that the warning had any relevance to the disciplinary penalty, and the Judge has satisfactorily explained his reasons for not hearing the evidence in relation to any more general issue of credibility, there is no point in this which is not satisfactorily explained.

42. Next, he complained about being prevented from explaining why the tail lift process was unsafe. Since it was accepted that there were genuine and reasonable grounds for thinking that it might be so, again, the relevance of any extended questioning as to this is to be doubted, and a Judge exercising proper case management would be expected to stop it.

43. The third complaint, more general, paragraph 29 of the affidavit, was when Mr Healey complained that, when he pursued a line of questioning, he might be asked to explain where he was going. It is undoubtedly disconcerting to be stopped and asked, not least because it might seem unfairly to indicate to the witness what the purpose of the question is, and thereby the cross-examiner loses the advantage he might otherwise have. But it is important, particularly in a case such as this where there may have been a large measure of obfuscatory material, for the Judge to attempt to keep a clear focus upon what mattered, and to help himself and his members address it by knowing the relevance of the point. In effect, that is what the Judge said.

44. The particular examples having been explored, and it being agreed by Mr Konanzad that these are not allegations of bias but of procedural irregularity, I have come to the conclusion that there is nothing to persuade me that there was here such material procedural irregularity as to vitiate the decision.

Conclusions

45. In concentrating upon the seven grounds of appeal, as they have been addressed to me, I am conscious that I have not cited every case nor every principle for which the advocates contended. I have not dealt with every single argument. I have, as I have suggested an Employment Tribunal should in dealing with the facts, focussed rather upon those matters which are central to my decision. For the reasons I have given, though initially concerned about the question of inconsistent treatment, I am satisfied that here the Tribunal said enough to satisfy its duty, that the other reasons for appealing have no merit, and in effect the rather more succinct expressions on the original sift by HHJ Birtles, to the effect that the Judge's reasons were cogent, identifying the issues, deciding the relevant evidence and coming to a reasoned conclusion and that of Recorder Luba QC on the revised Notice of Appeal, saying that there were no reasonable grounds, were well-founded. The appeal is dismissed.